Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
NO. 79-1804

RODOLFO GARCIA-JARAMILLO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANSWER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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OCTOBER TERM 1979
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1. Respondent filed its Memorandum in Opposition on May 30, 1980, which was received by petitioner on June 3, 1980.

2. Petitioner is filing the foregoing "Answer to the Memorandum for the Respondent in Opposition" pursuant to Section 5, Rule 24, Rules of the Supreme Court, adopted June 15, 1970.

3. Attention of this Court is respectfully invited to Section 1, Rule 24, Rules of the Supreme Court: the first

pleading which the Respondent is entitled to file is a Brief in Opposition which should be filed within fifty days of receipt of the Petition for Certiorari.

4. The designation made by the Solicitor General was "Memorandum For the Respondent in Opposition." It is very clear that said memorandum was not filed pursuant to Section 1, Rule 24, **supra.** It is not a brief. It is simply a memorandum of points and authorities.

5. Attention of this Court is likewise invited to Section 2, Rule 24, Rules of the Supreme Court, quoted for ready reference:

> "No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objection to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petition therefor."

6. The "Memorandum for the Respondent in Opposition" cannot be considered as a supplemental brief, filed pursuant to Section 5, Rule 24, because there was no brief in opposition to be supplemented.

7. It cannot be considered as a motion because there is no prayer. Assuming it is a motion for the "sake of argument" it is nonetheless disallowed by Section 2, Rule 24, cited above.

8. Since the memorandum filed by the Respondent is not authorized by the Rules of this Court, the same should be stricken from the record.

ARGUMENT

1. Although the memorandum of the Respondent failed to state its object, it is impliedly asking this Court to dismiss the petition.

2. Respondent cited Department of **Banking v. Pink,** 317 U.S. 264 (1942), and **R. Stern and E. Gressman, Supreme Court Practice,** 395-403 (5th Ed. 1978) as its authority.

3. In **Department of Banking v. Pink, supra,** the issue was: Did the motion to amend its remittitur toll the running of the three month period to file certiorari? The answer from this Court is: No. The case of **Department of Banking, supra,** is readily distinguishable with the present case in that: In **Department of Banking, supra,** the motion sought to amend the order of remittitur; it added statements to the effect that the federal question had been presented and passed upon by the court. In the case at bar, the motion of the petitioner, in which petitioner claimed to have tolled the running of the three month period, was a motion to adduce additional evidence, which purported to show alleged coercion.

4. Petitioner feels his contention is supported in the case **Bowman v. Loperena, et al.,** 311 U.S. 262 (1940) This case was cited on page 399, **R. Stern and G. Gressman, Supreme Court Practice** (5th Ed. 1978), which the Respondent cited in its memorandum.

5. In **Bowman, supra,** the District Court issued and order of adjudication on August 21, 1936. Petitioner filed

a petition for rehearing of an order of adjudication on September 10, 1936. Petitioner filed again a second petition for rehearing on November 15, 1937. On February 17, 1938, the petition for rehearing was denied. Petitioner appealed to the Court of Appeals for the Ninth Circuit on March 18, 1938. Petitioner specifically appealed the order of adjudication of August 21, 1936. The Court of Appeals for the Ninth Circuit dismissed the appeal because: although the appeal was taken within thirty days from the order denying the petition for rehearing, it came too late, because the adjudication was entered, August 21, 1936; the thirty days expired on that date. Petitioner filed a certiorari before this Court on the issue of: whether the filing of the petition for rehearing tolled the running of the thirty day period.

6. This Court has stated in **Bowman, supra,** page 266:

> "Treating the petition of September 10, 1936, and the motion of October 14, 1936, as petitions for rehearing of the order of adjudication, and the petition of November 15, 1937, as a second petition for rehearing filed out of time, the endorsement upon the latter by the judge of the court, and the hearing held and opinion announced upon it, show that it was entertained by the court and dealt with upon its merits. Until the order of February 17, 1938, no final decision was rendered sustaining the adjudication as against the debtor's attack.
>
> These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an

untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.

We hold that the court below should have entered the appeal.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion."

7. Petitioner contends that the filing of "Petition Pursuant to 28 U.S.C. 2347 (c) for Leave of Order Directing Respondent to Receive Petitioner's Additional Evidence" to the Court of Appeals on January 14, 1980, can be considered as filing a second motion for rehearing, as mentioned in **Bowman, supra.** The fact that the Court of Appeals accepted and denied it constitiuted enlargement of the period to file certiorari to this Court. Petitioner contends that the ninety day period should start on February 13, 1980, when said petition was denied as per the **Bowman** holding.

8. Petitioner feels that his contention is shared by this Court in the case of **Leishman v. Associated Electric Co.,** 318 U.S. 203. The issue presented before this Court

was: whether petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit within the time provided by law (28 U.S.C. 230).

9. This Court has stated **Leishman, supra,** page 205:

> "In so holding that the court recognize the general rule that where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend, or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion. But this case was differentiated on the ground that the instant motion was not one to amend the judgment but merely one to amend and supplement the findings and conclusions. 128 F. 2d 204. We granted the certiorari to settle the important question of practice presented under the Rules of Civil Procedure.
>
> We think that petitioner's time to appeal did not begin to run until the disposition of his motion under Rule 52 (b) on June 9, 1941, and accordingly that his appeal was timely. The motion was not addressed to mere matters of form but raised questions of substance since it sought reconsideration of certain basic findings of fact and the alterations of the conclusions of the court. In short the necessary effect was to ask that rights already adjudicated be altered. Consequently it deprived the judgment of that finality which is essential to appealability. Cf. **Zimmerman v. United States,** 298 U.S. 167; **Department of Banking v. Pink,** 317 U.S. 264. It is immaterial that petitioner

did not specifically request the amendment of the judgment, and the distinction based on this failure to request by the court below is artificial and untenable. If the motion had been granted and the requested amendment and supplemental findings made, the judgment would have to be amended or altered to conform to those findings and the conclusions resulting from them. We conclude that a motion under Rule 52(b) such as the instant one which seeks to amend or supplement the findings of fact in more than purely formal or mechanical aspects tolls the appeals statute, and that the time for taking an appeal runs from the date of the order disposing of the motion. Cf. **Continental Oil Co. v. United States,** 299 U.S. 510.

The motion was not one for a new trial under Rule 59 and respondent's argument, based on that premise, that it was not filed in time, is not pertinent."

10. Again, petitioner contends that the petition filed by petitioner to the Court of Appeals on January 14, 1980, tolled the running of the ninety day period per the **Leishman** holding.

WHEREFORE, in view of all the arguments and authorities cited, a Writ of Certiorari should be issued to review the opinion and orders of the Ninth Circuit.

Respectfully submitted,
LAW OFFICES OF FREDERICK HETTER

BY: FREDERICK HETTER
Attorney for Petitioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss.
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush St., Santa Ana, California 92701.

On June 17, 1980 I served the within ANSWER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION on the interested parties in said action, by placing a true copy in each of 3 sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

WADE McCREE
Solicitor General of
The United States
Department of Justice
Washington, D.C. 20530

MARGARET J. PERRY
Attorney
Department of Justice
Washington, D.C. 20530

JAMES J. O'KEEFE
DISTRICT DIRECTOR
Immigration and Naturalization Service
880 Front Street
San Diego, CA 92188

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on June 17, 1980 at Santa Ana, California.

Jack Gallagher